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IN THE

Supreme Court of the United States

October Term, 1967

No. 1329

SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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GLOSSARY

Edison or Petitioner	Southern California Edison Company
Commission or FPC	Federal Power Commission
Pacific Lighting	Southern California Gas Company, Southern Counties Gas Company and Pacific Lighting Service and Supply Company (collectively)
Gulf Pacific	Gulf Pacific Pipeline Company
El Paso	El Paso Natural Gas Company
Transwestern	Transwestern Pipeline Company
Gulf Pacific Project	That Supply Proposal Applied for In FPC Docket CP63-223
APCD	Air Pollution Control District of the County of Los Angeles
TSP	The so-called Tailored Supply Program of Pacific Lighting Consisting of the El Paso and Transwestern Applications in FPC Dockets CP 64-76 and CP64-91 Which Was Adopted By The Commission
Jt. App.	The Joint Appendix Filed With The Court of Appeals for the Third Circuit in No. 16434
Comm. Br. to the CA for the 3rd Cir.	Commission's Brief to the Court of Appeals for the Third Circuit

IN THE

Supreme Court of the United States

October Term, 1967

No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Southern California Edison Company (Edison), prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Third Circuit entered December 21, 1967, in No. 16434 affirming Decisions Nos. 500 (R. 68820-960, Jt. App.* pp. 738-878) and 500-A (R. 69314-38, Jt. App. pp. 1057-81) of the Federal Power Commission** (hereinafter sometimes referred to as "Commission" or "FPC").

CITATION TO OPINION BELOW

The judgment and supporting opinion of the Court of Appeals for the Third Circuit of December 21, 1967 and Order denying rehearing are printed as Appendix A hereto (*infra*, pp. 1a to 4a) and have not yet been reported. The orders of the Federal Power Commission under review are printed in the Joint Appendix below (R. 68887-90, Jt. App., pp. 805-8 and R. 69328, Jt. App., p. 1071) and are reported at 36 FPC 176, and at 36 FPC 1010, respectively.

JURISDICTION

The opinion of the Court of Appeals was filed on December 21, 1967, and the judgment was entered on December 21, 1967. A petition for rehearing was filed by petitioner on January 5, 1968, and the Court of Appeals' order deny-

* "Jt. App." refers to Joint Appendix filed with the United States Court of Appeals for the Third Circuit in No. 16434.

** *In re Transwestern Pipeline Company, et al.*, FPC Dockets CP 63-204, et al.

ing rehearing was entered on January 24, 1968. Jurisdiction of this Court over said judgment is invoked under Title 28 U.S.C. § 1254(1) pursuant to Rules 19, et seq., of this Court and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) (1958). Said statutory provisions are set forth in Appendix B hereto (pp. 8a-9a, 13a, *infra*).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Power Commission, under the guise of administrative expertise, may depart from procedures specified in its own rules and in Section 7(c) and (d) of the Administrative Procedures Act by reaching a decision in a certificate proceeding, involving competing applications, through reliance on material outside the record which significantly influences the decision and which a party is denied, after timely request, opportunity to meet and rebut, particularly when such material is demonstrably wrong in a number of material respects, and results in a denial of a fair hearing and in the deprivation of property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States (U. S. Const. Amend. V; Natural Gas Act (Sec. 7(c)); Administrative Procedures Act (Sec. 5(a) and (b) and Sec. 7(c) and (d)); Regulations Under The Natural Gas Act (§ 157.11); and §1.26(d) of the Rules of Practice and Procedure of the Federal Power Commission.

2. Whether the grant of the certificating powers to the Federal Power Commission in the Natural Gas Act is intended to permit the FPC effectively to preempt state and local air pollution control laws and regulations, which are not incompatible with any defined policy of the Federal Government, and to be so broad as to permit the FPC to frustrate and prevent the consummation of a pipeline project which undeniably would have reduced fuel oil burning in the local area involved, in accordance with the desires of the Air Pollution Control authorities and the public,

particularly where there was no finding that the consummation of such project would be harmful to any other areas or would deprive them of adequate gas supplies and where there was no question of the projects' meeting the traditional tests of public convenience and necessity, i.e., adequacy of supply and market, economic feasibility and ability to finance (Natural Gas Act, Section 7(c)).

3. Whether the Federal Power Commission in granting certificates of public convenience and necessity under the Natural Gas Act (Sec. 7(c)) can arbitrarily, under the guise of administrative discretion, refuse to attach conditions which are both appropriate and essential to protect a party's rights to due process of law under the Fifth Amendment of the Constitution of the United States (U.S. Const., Amend. V).

4. Whether the Commission, in denying the Gulf Pacific Pipeline Company (Gulf Pacific) application, exceeded its authority and improperly applied the statutory standards of the Natural Gas Act:

a. By preventing more adequate compliance with the local air pollution controls, thereby frustrating their purpose and the desires of the public;

b. By utilizing its certificate powers to perpetuate a monopolized gas supply situation by requiring Edison to take gas service from its chief competitors for the energy market, instead of from a new independent gas supplier in one of the few areas in the United States now served solely by one affiliated gas utility system; and

c. By determining in this case that the statutory exemption for direct sales (Section 1(b) of the Natural Gas Act, (15 U.S.C. § 717(b)) is limited to such sales which are "a useful adjunct to the normal pattern of interstate pipelines." (R. 68881, Jt. App., p. 799)

5. Whether the Commission arbitrarily denied to Edison fair comparative consideration upon the basis that it had

previously established for the proceeding, namely "to determine how the long term needs for natural gas deliveries to Southern California may be met in the manner which is most desirable from the standpoint of the public interest". (*Re El Paso Natural Gas Company*, Docket G-16235, 30 FPC 77, 92).

6. Whether the Court of Appeals erred in concluding that the Commission's orders were rationally based, supported by the record and reached by procedures required by law.

7. Questions arising from an inherent ambiguity of the decision of the Court of Appeals:

a. Whether the Court of Appeals, in its decision affirming the orders of the Federal Power Commission, concluded that a basis different from that used by the Commission could rationally support the result and, in so doing, has exercised its judicial review in a way in conflict with the applicable decisions of this Court and with the decisions of other Courts of Appeal and, in so doing, has erred;

b. Whether the Court of Appeals, in its decision affirming the orders of the Federal Power Commission, upheld the reliance by that Commission upon its defective gas balance study and other material also outside of the record and, in so doing, has sanctioned such a departure by the Commission from the accepted and usual course of judicial and administrative proceedings as to call for an exercise of this Court's power of supervision.

8. Whether the Court of Appeals erred in denying Edison's petition for rehearing which sought clarification of the inherent ambiguity in the Court of Appeals' decision, in order that the parties and this reviewing Court could be appropriately apprised of the basis for the Court of Appeals' decision affirming the Commission's orders.

9. Whether the Court of Appeals denied petitioner the appropriate judicial review to which it is entitled under the Natural Gas Act (Section 19(b)).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The provision of the United States Constitution involved is Amendment V (U.S. Const. Amend. V).

The statutory provisions involved are Title 28 U.S.C., Section 1254(1); Sections 1(b), 7(c), 7(e) and 19(b) of the Natural Gas Act (15 U.S.C. Sections 717(b), 717f(c), 717f(e) and 717r(b)) and Sections 5(a) and (b), 6(a), 7(c) and (d), and 10(e) of the Administrative Procedures Act (Chapter 24 — Public Law 404, 60 Stat. 237-244 (1946).

The regulations involved are § 157.11 of Regulations Under The Natural Gas Act (18 C.F.R. § 157.11) and § 1.26(d) of the Rules of Practice and Procedure of the Federal Power Commission (18 C.F.R. § 1.26(d)).

The Constitutional provision, statutes and regulations relied upon are printed in Appendix B hereto as pp. 5a-14a.

STATEMENT OF THE CASE

Edison, a California corporation, is engaged in the business of generating, distributing and selling electric energy as a public utility principally in certain portions of central and southern California. The territory served by it contains an estimated population in excess of 7,000,000 people. To supply essential electric utility service to the area, Edison operates a number of steam electric generating plants in southern California.

In its continuing efforts to make arrangements for long term fuel supplies for such generating plants, in the face of the monopolized gas supply situation heretofore recognized by this Court in *United States of America v. El Paso Natural Gas Company*, 376 U.S. 651 (1964), involving similar aspects to this increasingly difficult problem, Edison en-

tered into the arrangements underlying the Gulf Pacific Project to firm up supplies for its long term needs for gas fuel from a reliable competitive source.

The needs of Edison for long-term assured natural gas supply arrangements, of the type exemplified by those involved in the Gulf Pacific Project, resulted from the changed circumstances which have occurred in the southern California area since World War II, requiring revolutionary changes in the operations of the electric utilities in that area. These resulted primarily from two main circumstances.

1. The demands of an exploding postwar population in Edison's territory for electricity quickly outstripped the capacity of the limited number of hydroelectric plants that could be built on the few sites in that semi-arid area; Edison therefore had to adopt a massive construction program to develop new steam electric generating stations.[1]

2. The need to increase the use of natural gas by the electric utilities in their steam electric generation in order to meet public demand to decrease the use of fuel oil because of air pollution and to comply with the legislated regulations of local authorities designed for air pollution control.[2]

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[1] To illustrate: Before World War II, the Edison system, from an electric energy production standpoint, was primarily dependent upon hydroelectric generation for its main energy requirements, supplemental energy being supplied by thermal generation from a single steam electric station. In 1940, for example, of a total of 3,654 million kilowatt-hours transmitted, less than 4 percent was thermal generation. In contrast, in 1962, steam plants on the Edison system supplied about 80 percent of the 23,900 million kilowatt-hours transmitted, and its total fuel bill increased from less than $250,000 in the year 1940 to more than $64,000,000 in 1962. (Horton, R. 300-3, Jt. App., pp. 4-6; Ex. 40, R. 29249, Jt. App., p. 187; Chart 4-A of Ex. 361, R. 32828, Jt. App., p. 338).

[2] In Los Angeles County, for example, air pollution control ordinances require that the electric generating agencies burn gas rather than residual oil, which has been generally relied on as backup fuel for electric generation, at any and all times that gas is made available by the local gas distributing companies. Rules 62 and 62.1 of the Air

During the period since the end of World War II, the gas supplies available to Edison for electric generation have principally come from the Pacific Lighting companies (Southern California Gas Company and Southern Counties Gas Company of California, referred to herein along with Pacific Lighting Service and Supply Company as "Pacific Lighting") which provided service to the electric generating utilities only upon an "interruptible" basis,[3] with the electric generating utilities having the lowest priority and being the first to be curtailed. The amount of gas available under such type of service varies greatly from time to time during the year and from year to year, depending upon the gas resources available at any particular time to Pacific Lighting and its other market requirements, and these, in turn, are substantially affected by the weather, since its higher priority customers utilize many times more gas in cold weather than in warm weather (Ex. 41, pp. 54, 56, 57, R. 29309, 29311-12, Jt. App., pp. 190-2).[4]

As has heretofore been recognized by this Court, the assurance of a steady and ample supply of fuel for steam electric generation and the need for adequate arrangements therefor by an electric utility is in the public interest; otherwise electric consumers are exposed to unjustified increased costs and to service failures. (See: *Tampa Electric Co. vs. Nashville Coal Co.*, 365 U.S. 320, 334 (1961)).

Pollution Control District of the County of Los Angeles (APCD) adopted by the Los Angeles County Board of Supervisors (Ex. 45, pages 24, 24a, R. 29582-3, Jt. App., pp. 235-6; Horton, R. 303-5, Jt. App., pp. 6-7).

[3] "Interruptible" gas schedules permit the seller to curtail buyers' gas supply in whole or in part at any time and from time to time upon short notice. In the case of Edison, the sellers are the same gas companies (Pacific Lighting) who are also Edison's principal rival for the hotly contested energy market in southern California. (C.f., Chart 4-B and 4-D of Ex. 41, R. 29295, 29306, Jt. App., pp. 188-9).

[4] For example, between an average year and a cold year, gas supplies available for electric generation have varied as much as the equivalent of 6,000,000 bbls. of oil. (Kelsey, R. 9962, Jt. App., p. 100).

Faced with these circumstances, Edison and the City of Los Angeles Department of Water and Power negotiated contracts with Humble Oil and Refining Company and other Texas producers for an assured gas supply for a twenty-year period, and with Gulf Pacific for the transportation of such supply to their respective steam electric generating stations in the Los Angeles area, the net result of which was stabilized delivered prices for gas for twenty years at levels which were competitive with the prices being paid by the electric utilities for the inferior service of the Pacific Lighting companies (Horton, R. 306-10, Jt. App., pp. 7-9). In addition, the utilization of such gas in such electric generating stations would have uncontradictably meant that substantially less fuel oil would have had to be burned in the area, in accordance with the demands of the public in southern California, and would have permitted greater compliance with the regulations and desires of the air pollution control authorities in southern California (Horton, R. 303-7, Jt. App., pp. 6-8; Proctor, R. 18156, 18163, 18419-22, Jt. App., pp. 131-4; Ex. 639, 640, R. 35979-82, Jt. App., pp. 364-7).

The Commission's proceedings below involved the purported comparative determination by the Commission of three separate applications for certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act for facilities required to deliver additional gas to California. The proceedings, which were held before an FPC Examiner, involved 170 days of hearing, a transcript in excess of 28,000 pages and almost 900 exhibits; the Examiner who presided over the proceedings recommended certification of the Gulf Pacific Project (R. 66634, Jt. App., p. 679). The majority of the Commission, however, reversed the Examiner and, in so doing, placed substantial reliance upon outside-the-record data, including a complicated gas balance study (a study purporting to determine which combination of alternative gas supplies

would meet the market requirements at the lowest cost) which was the central basis of its conclusions upon the comparative economics involved; such data were never presented at the hearings, and Edison was denied all opportunity to test or rebut such data, though it made timely request to be permitted to do so in its petition to the Commission for rehearing.[5] The Commission also committed a number of additional legal errors which were prejudicial to Edison.

Edison, an intervenor and interested party in the proceedings and one of the entities for whom Gulf Pacific was to transport gas in FPC Docket No. CP63-223, being aggrieved by Opinions Nos. 500 and 500-A, and accompanying Orders dated July 26, 1966, and December 9, 1966, respectively, sought review of said orders in the United States Court of Appeals for the Third Circuit under Section 19(b) of the Natural Gas Act (15 USC § 717r(b)). The Court of Appeals having affirmed the Commission's orders on December 21, 1967, and denied Edison's petition for rehearing on January 24, 1968, Edison seeks here to have said Commission orders reviewed as well as the Third Circuit's judgment affirming those orders.[6]

REASONS FOR GRANTING WRIT

Petitioner is gravely concerned with the effect of the aforesaid unlawful actions on its ability to obtain adequate fuel supplies for its electric generating plants in the years ahead so as to continue to provide essential electric utility service in a reliable, efficient and economical manner to the more than 7,000,000 people in its service area; this must be done in the face of unrelenting pressures from local regulatory agencies and the public generally to discontinue use of conventional fuel oil in such generating plants and

[5] Edison's petition to Commission for rehearing, p. 14, R. 68991, Jt. App., p. 901.

[6] A more complete chronological statement of the proceedings is set forth in Appendix C.

in the face of a persisting monopolized market supply situation heretofore dealt with by this Court in *USA v. El Paso Natural Gas Co.*[7] and *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*[8] So long as the Commission's decision in the case at bar stands unreversed, it imposes a formidable burden on anyone seeking to interest new gas suppliers in mounting any new project similarly designed to serve the electric utilities in southern California.

To the extent that petitioner is denied success in its more than 10-year effort to obtain an adequate and competitive supply of gas fuel for the enormous and increasing requirements of its electric generating plants, it is faced with a Hobson's choice of either having to place increased reliance upon conventional residual fuel oil (the burning of which has been restricted by air pollution control authorities in southern California and the local production of which is being severly limited by the oil producing industry in southern California because of such action by the air pollution control authorities), or of having to resort to the use of considerably more costly "low sulphur" fuel oil that is only available to a limited extent and then only from overseas sources of supply (primarily Indonesia), thus rendering such alternative supply not only costly but of questionable reliability from both a logistics and national security standpoint. (C.f., Pres. Proclamation No. 3794 July 19, 1967, 32 F.R. 10547) The Commission's failure to consider such aspects of this increasingly difficult community problem, its denial to Edison of a fair hearing on these and related economic issues and the apparent sanctioning thereof by the Court of Appeals has lead Edison to seek further review of the Commission's action by this Court because of the importance of the unresolved problems involved which so vitally affect such a large segment of the public.

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[7] 376 US 651 (1964).

[8] 386 US 129 (1967).

We believe that this Court will not consider lightly: (1) any decision and order by a regulatory agency that results in placing in jeopardy essential electric energy supplies for more than 7,000,000 people, as well as for essential industries and enterprises such as hospitals and defense installations and requiring increased reliance on foreign sources of oil, as did the challenged Commission orders; nor (2) any administrative decision which requires the electric utilities to operate in an unfavorable economic manner in order to permit the competing gas utilities to operate in what they deem to be the most economic manner from their standpoint, thus imposing added economic burdens upon electric consumers for the benefit of gas consumers and unfairly discriminating against the former; nor (3) any administrative procedures which deny to the parties, despite their timely request, all opportunity to meet and rebut outside-of-the-record material that is so relied upon and utilized in reaching administrative determinations at the very heart or center of the controversy; nor (4) any federal administrative decision which unnecessarily frustrates state and local policies designed to alleviate air pollution and which are not incompatible with any federal policy or provision in the Natural Gas Act but which, in fact, are encouraged and supported by other agencies of the federal government and by federal laws; nor (5) an administrative decision which misapplies the statutory standards of the Natural Gas Act and is in conflict with the policies thereof as heretofore established by this Court; nor (6) any judicial decision which sanctions such policies and procedures of an administrative agency.

All of such results are effected by the actions of the Commission and the Court below in the case at bar. So long as such actions go unreversed, they must be expected to continue to have a significant adverse effect upon the existing legal rights of the petitioner and to be utilized in the future

as a precedent that could be expected to undermine the integrity of the entire administrative process.

WHAT THE COMMISSION DID

With this background regarding the results of the Commission action, let us review in detail what the Commission erroneously did which achieved such unfortunate results for southern California electricity users.

1. The Commission Flagrantly Violated Its Own Rules Of Practice and Procedure and the Administrative Procedures Act and Denied Edison A Fair Hearing.

The Commission, in relying on material outside the record without allowing the parties opportunity to meet and rebut it, or otherwise respond thereto, has violated the requirements of both its own Rules of Practice and Procedure (§ 1.26(d)) and the Administrative Procedures Act (Sec. 7(c) and (d)), denied Edison the fair hearing required by the Natural Gas Act (Sec. 7(c)) and unlawfully deprived it of its property without due process of law in violation of the Constitution of the United States (Amend. V).

The Commission reversed the decision of its Presiding Examiner which was based on the record and, in so doing, demonstrably relied upon material outside the record; it placed its principal reliance upon a complicated off-the-record study (which included admitted errors) of the comparative cost of the alternative supply arrangements involved in the proceeding. The Commission further refused Edison's timely request to be permitted to meet and rebut the off-the-record material, contrary to the unequivocal requirements of the Commission's own Rules of Practice and Procedure and of the Administrative Procedures Act. This is a clear violation of the basic requirements of a fair hearing in administrative proceedings. As stated by Professor Davis in his Administrative Law Treatise:

"The basic principle is that parties should have opportunity to meet in the appropriate fashion all materials that influence decision. Nothing short of opportunity for cross examination and presentation of rebuttal evidence is appropriate for disputed adjudicative facts at the center of the controversy". (2 Davis Administrative Law Treatise, page 403-404).

Better illustrations of the violations of this basic principle could hardly be imagined than those provided by the case at bar.[9]

(a) In reaching its decision, the Commission relied upon a number of reports and studies made by Congressional Committees and others which were nowhere presented in the record and which bore dates subsequent to the close of the record, and denied all opportuntiy to cross-examine or to present rebuttal testimony, even though Edison made timely request to do so in its petition for rehearing to the Commission.[10]

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[9] See *Ohio Bell Telephone Co. v. PUC*, 301 US 292 (1937); *Market Street Railway v. Railroad Comm.*, 324 US 548 (1945); Davis, Adm. Law Treatise, Vol. 2, p. 418; see also annotation "Administrative decision or findings based on evidence secured outside of hearing, and without presence of interested party or counsel," 18 ALR 2d 552 et seq.).

[10] Such reports referred to by the Commission included: "The Adequacy of Technology for Pollution Abatement," a report of the Research Management Advisory Panel (Subcommittee on Science and Astronautics, U.S. House of Representatives, 89th Cong. 2d (1966)) [R. 68839, Jt. App., p. 757]; "Waste Management and Control", a Report to the Federal Council for Science and Technology by the Committee on Air Pollution of the National Academy of Sciences and the National Research Council (1966), pp. 165-166 [R. 68841, Jt. App., p. 759]; Hearings Senate Subcommittee on Public Works, Committee on Appropriations, June 13, 1966, presentation of the Administrator of the Bonneville Power Administration, report of House of Representatives, Public Works for 1967, Part 2, p. 498 [R. 68850, Jt. App., p. 768]; "Comparison of Coal-Fired and Nuclear Power Plants for the TVA System", Office of Power, Tennessee Valley Authority, Chattanooga, Tennessee, June 1966 [R. 68854, Jt. App., p. 772]; and Hearings, Senate Subcommittee on Public Works, supra, and Hearings, House Subcommittee on Appropriations, supra [R. 68854, Jt. App., p. 772]. See Edison's Petition to the Commission for Rehearing, R. 68991, Jt. App. p. 901.

As stated in the Dissent to Opinion No. 500-A (R. 69330, Jt. App., p. 1073):

"The extent to which the majority relied on these reports in making its determination to certificate a short-term supply is evidenced in its discussion of remote mine-mouth generation and extra high voltage transmission (EHV) in the initial opinion. It said regarding EHV and the West Coast Intertie, 'One 835-mile line is scheduled to be energized in 1969 and the second in 1971.' For this proposition it cited, 'Hearings Senate Subcommittee on Public Works, Committee on Appropriations, June 13, 1966.' It is not coincidental that the apparent availability of these sources of energy by 1969 and 1971 coincides with the time TSP[11] will require more gas. This report obviously had an influential effect on the majority in its decisional process, yet the report deals with such speculative issues as timing, energy, and availability which the protesting parties could not inquire into. Nor was this an isolated instance. Further, in the initial opinion, the majority refers to a study introduced by Pacific Lighting pertaining to production of electrical energy in southern California by nuclear plants. This study was attacked in the hearing by Gulf Pacific as being too optimistic. Nevertheless, the majority, having the advantage of a report entitled, 'Comparison of Coal-fired and Nuclear Power Plants for the TVA System', published in June 1966 by the Tennessee Valley Authority, stated, 'Whatever merits Gulf Pacific's position may have had in 1964 when testimony on this subject was taken, it now appears that nuclear generation is meeting this economic test.' [R. 68853, Jt. App., p. 771] [Our emphasis added]. Of course, since the TVA report was outside the record it could

[11] TSP refers to the so-called Tailored Supply Program of Pacific Lighting which was adopted by the Commission.

not be questioned or looked into by the protesting parties. Furthermore, in the highly contested matter of air pollution, two recently published reports were relied upon by the Commission without the parties having the opportunity to cross examine or introduce additional or counterbalancing evidence. The dictates of a fair hearing would seem to require that they be able to meet them in some manner. On this point I would refer to Davis, Administrative Law Treatise, Vol. 2, 'Our thesis is that the reconciliation can best be accomplished by recognizing that the cardinal principle of fair hearing is not that all facts should be in the record or that all facts should be subject to cross-examination, **but rather that parties should have opportunity to meet in the appropriate fashion any materials that influence decision.**' (emphasis added). Thus, I cannot look upon a 'timely request' so lightly as the majority and would allow an opportunity for the protesting parties to respond to these documents which were obviously relied upon heavily by the majority in its decision to certificate TSP rather than the often promised, but never granted, long-term supply of natural gas."

(b) The very foundation of the Commission's decision (Opinion No. 500) was a comparative cost analysis on the basis of which the Commission made specific findings (R. 68869, 68880, Jt. App., pp. 787, 798) but which was also outside the record and as to which no opportunity to cross examine, rebut, or prove to the contrary ever has been granted.[12] The Commission's analysis in this case was based

[12] The Commission itself emphasized (Op. 500, R. 68865, Jt. App., p. 783) that in this very case cost considerations played a major and perhaps decisive role. In Opinion 500-A, the Commission (at R. 69322, Jt. App., p. 1065) makes it clear beyond question that the comparative cost study of Appendix B to Opinion No. 500 (R. 68895, et seq., Jt. App., pp. 813, et seq.) was the very touchstone of its cost findings (R. 68869, Jt. App., p. 787), and of its ultimate determination. Indeed, the Gas Balance which belatedly appeared in the Ap-

upon a gas balance study (such gas balance studies are designed to determine which combination of alternative, available gas supplies will meet the market requirements at the lowest cost) involving complex assumptions and complicated computations that were not disclosed at any time before the Commission's decision denying rehearing. That this was the procedure followed has really nowhere been denied. Rather, the Commission attempted to justify it, in its brief to the lower Court (p. 22), upon the grounds of alleged "expertise" and on a purported reliance upon the *Market Street Railway* case, 324 U.S. 548 (1945). In contrast to the facts in the case at bar, this Court, in that case in which the outside-the-record material utilized by the Commission was material which the Market Street Railway Company's own employees had prepared, consisting of its own reports, pointed out:

> "No contention is made here that the information was erroneous or was misunderstood by the Commission, and no contention is made that the Company could have disproved it or explained away its effect for the purpose for which the Commission used it . . . It does not appear that the Company was in any way preju-

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pendix to Opinion 500-A (R. 69333-8, Jt. App., pp. 1076-81) is the true determinant of the cost and market findings the Commission made. The unit rate of the gas proposed to be purchased by Pacific Lighting under the El Paso and Transwestern applications declines as the contract volume increases, and total cost reflects the unit rate and annual purchase load factor. Thus, if the contract volume level of Pacific Lighting purchases can be increased "With Gulf Pacific" as well as without, the incremental savings cited by the Commission are realized in either case, provided satisfactory load factors can be achieved. The final cost result reflects the contract volume selected to be purchased, the timing of any increases in contract volume, and the balancing of these basic relatively constant volumes against widely fluctuating requirements by employing the available load balancing tools of storage, seasonal and emergency gas, variations in daily purchase volumes, and curtailment of interruptible customers. As even a cursory inspection of the gas balance material shows, it is an intricate and complex technical study frequently, if not usually, accomplished by computer operations.

diced thereby, and it makes no showing that, if a rehearing were held to introduce its own reports, it would gain much by cross-examination, rebuttal, or impeachment of its own auditors or the reports they had filed." (324 U.S. 548, 561-2). (our emphasis)

That the contrary is true in the case at bar is demonstrated by Edison's "Revision of the Commission's Gas Balance Study to Correct Defects" (Appendix D hereto) which Edison presented to the Court of Appeals to indicate the kind of evidence which could have been presented to the Commission in refutation of its study. Even when using the same principal assumptions used by the Commission,[13] Edison's revision of the Commission's gas balance "With Gulf Pacific" (the proposal supported by Edison) for the Commission's test year 1970 shows an average cost of gas to the market which is 0.86 cents per Mcf less than with the Commission's gas balance "Without Gulf Pacific" (the proposal adopted by the Commission). In total dollars this represents more than $10 million less cost per year "With Gulf Pacific" than "Without Gulf Pacific", when applied to the potential gas market found by the Commission.

This Court, in the *Market Street Railway* case, went on to say:

> Due process, of course, requires that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal. But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of the parties."

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[13] Such revised study utilized the same storage facilities, the same basic supplies available and the same unit prices for volumes purchased from out of state. It then merely corrected for an admitted error and reflected efficient utilization of the same storage facilities and available gas supplies.

Nobody in the case at bar has contended, nor could anyone, that more than $10 million less annual cost "With Gulf Pacific" is not substantial.

A much closer parallel to the factual and procedural situation in the case at bar is that which was involved in *Ohio Bell Telephone Company v. PUC*, 301 U.S. 292 (1937) where this Court, in a unanimous decision written by Mr. Justice Cardozo, reversed a rate order because of the Commission's having gone outside the record in fixing property values for rate-making purposes, and stated:

> "Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial." (301 US 292, 300).

As to the claimed "expertise" of the Commission in the case at bar, it is also pertinent to point out that reliance of the Court in the *Market Street Railway* case was placed upon the fact that there the state Commission was "so experienced . . . with the affairs of [the] particular appellant" (324 U.S. 548, 560); such justification for the Commission's actions does not exist here, for neither the FPC nor its Staff is so "experienced with the affairs" of Pacific Lighting, a distribution system *not* subject to its

jurisdiction, with whom it has come into contact upon supply issues only occasionally, and whose load balancing operations and economic behavior differ materially from natural gas transmission systems (c.f., *El Paso Natural Gas Co.* G-12580, 22 FPC 900, 903).

As one demonstration of the Commission's lack of expertise in this regard, we would respectfully urge the Court to consider this fact: the Commission's gas balance study "Without Gulf Pacific", which was disclosed for the first time in the Commission's decision denying rehearing (Opinion No. 500-A, R. 69333-38, Jt.App. pp. 1076-81), postulates gas storage operations which force the Pacific Lighting system into the winter peak heating season with a zero gas storage balance at that time of need. The occurrence of a severe peak in December or early January could literally mean disaster from the standpoint of those distributing companies' operations. No one has claimed, and no one with any expertise could claim, that the Pacific Lighting system could be operated this way, for it would violate every principle of sound management of a gas distributing company. The Commission's response before the lower Court to this glaring deficiency, while admitting its existence, was that they would simply buy some more gas (Comm. Br. to CA for 3rd Cir., p. 25). There is no doubt that this is what they would have to do. But what does this mean? It means that the Commission, in its study, has tested the comparative economics of the situation "Without Gulf Pacific" by employing a supply which admittedly does not meet the market requirements. The recognized fact that they would have to buy more gas would result in a higher level of service, which the Commission itself had determined would produce higher costs. (Op. 500, R. 68847-8, Jt. App., pp. 765-6). And so it has tested the economics of the situation admittedly without a consideration of all of the cost factors which would necessarily be involved. The recognized necessity of buying more gas

would obviously require the construction of a completely new study and a completely new gas balance to make any correct determination of the cost of gas at the load center and of the most economic supply combinations to meet at least the minimum requirements. Such a new study, to be sound, would have to consider the total energy costs which the Commission demonstrably failed to consider. Although the Commission's study admittedly contained these defects, Edison has been denied the right to cross-examine or to rebut it.

It is the avoidance of errors such as these that the provisions of both the Administrative Procedures Act and the Commission's own Rules of Practice and Procedure, providing the parties opportunity to meet and rebut such material, are designed to prevent (see pp. 32-37, *infra*). A better illustration of the wisdom of the rules and of the denial of a fair hearing, from failing to follow them, could, we submit, hardly be imagined.

2. The Commission Frustrated Local Police Regulations Designed To Alleviate Air Pollution Which Involved No Conflict With National Air Pollution Policies And No Conflict With the Policies of The Natural Gas Act As Heretofore Construed By This Court And In So Doing Exceeded Its Jurisdiction.

The Commission, in denying the Gulf Pacific Application (which the record showed met all of the traditional tests of public convenience and necessity)[14] and certificating the El Paso and Transwestern applications, made a determination that the requirements and desires of the air pollution control authorities and the public in southern California, for the substitution of gas fuel for fuel oil in

[14] i.e., adequacy of supply and market, economic feasibility and ability to finance. See *re Kansas Pipeline and Gas Company, et al.* 2 FPC 29 (1939); *re Houston Texas Gas and Oil Corp., et al.* 16 FPC 118, 122 (1956). (Op. 500, R. 68829-31, 68873, 68881-2, Jt. App., pp. 747-9, 791, 799-800, reflect evidence that the Gulf Pacific Project met traditional tests of public convenience and necessity.)

electric generating plants in that area, would not, in the FPC's view have an appreciable effect upon air pollution control,[15] in spite of the determinations of the local air pollution control authorities to the contrary[16] and in spite of its own previous recognition that "the state and local agencies . . . . have the best knowledge of the smog problems" and that the FPC should not "pre-empt the expertise of the California authorities" (*re El Paso Natural Gas Co.* 22 FPC 900, 903). In this case, the Commission did effectively pre-empt the expertise of the California authorities and create a serious conflict between its policy position and that of the local regulatory authorities and did so because of its conclusion, based upon its cost study that did not reflect all the costs, that it would be more economical (*supra*, pp. 19 and 20).

There is no such conflict between national air pollution policy or the federal agencies directly responsible therefor, such as the Department of Health, Education and Welfare and local authorities, but, rather, the announced federal policies relating to air pollution and policy actions of the federal executive department and enactments of the Congress support the aims and objectives of the local authorities involved (see *infra*, pp. 22-4). A resolution of the conflict created in this case between the pre-emptive actions by the FPC on the one hand and the air pollution control policies of the federal executive and legislative branches and the local air pollution control authorities on the other hand is urgently needed to enable those caught on the horns of the dilemma thereby created to resolve the resulting problems and to eliminate the cross-currents of administrative jurisdiction and control which, until resolved, can only tend to hinder consummation of the national policies on air pollution.

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[15] Opinion No. 500 R. 68839, Jt. App., p. 757.

[16] Griswold, R. 422-3, Jt. App., pp. 17-18; Rules 62 and 62.1 of APCD, Ex. 45, R. 29582-3, Jt. App., pp. 235-6.

This FPC created conflict seems clearly in violation of decisions of this Court as well as the policy pronouncements and legislative enactments of the federal government.[17] It is well established that the Constitution, in conferring upon Congress the regulation of commerce, never intended to prevent the states from legislating upon all subjects relating to the health, life and safety of their citizens.[18] In *Welch Co. v. New Hampshire*, 306 U.S. 79 (1939), this Court stated:

> "Plainly Congress by mere grant of power to the Interstate Commerce Commission did not intend to supersede state police regulations established for the protection of the public using state highways." (306 U.S. 79, 85).

and in *Huron Cement Co. v. Detroit*[19] this Court stated:

> "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously know as the police power." (362 U.S. 440, 442).

In the absence of conflict or incompatibility of such local police regulations dealing with air pollution with some clearly defined policy of the Federal Government, the regulations and their objectives are entitled to full recognition and support and should not be frustrated by any action of the FPC.

The clearly defined policy of the federal government supports such local air pollution control regulations. As stated by this Court in the *Huron* case, *supra*, at page 445:

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[17] Clean Air Act of 1963, Public Law 88-206; Air Quality Act of 1967, Public Law 90-148, discussed *infra*. See also Executive Order 11282 dated May 26, 1966 relating to restrictions on governmental installations similar to those in Los Angeles County and Title 42 C.F.R. Part 76 issued June 2, 1966 (31 F.R. 7902, June 3, 1966) and Mar. 17, 1967 (32 F.R. 4415, Mar. 23, 1967).

[18] As disclosed in this record, the APCD has been most successful in defending its position in such circumstances; cf., *People v. Plywood Mfrs. of Cal., etc.*, 137 CA2; 859, 291 P.2d 587 (1955).

[19] *Huron Cement Co. v. Detroit*, 361 U.S. 440 (1960).

"By contrast, the sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and enhance the cleanliness of the local community. Congress recently recognized the importance and legitimacy of such a purpose, when in 1955 it provided:

> "'[I]n recognition of the dangers to the public health and welfare, injury to agricultural crops and livestock, damage to and deterioration of property, and hazards to air and ground transportation, from air pollution, it is hereby declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the states and local governments in controlling air pollution, to support and aid technical research to devise and develop methods of abating such pollution, and to provide Federal technical services and financial aid to State and local government air pollution control agencies and other public or private agencies and institutions in the formulation and execution of their air pollution abatement research programs'. 69 Stat. 322; 42 U.S.C. § 1857.[20]

"Congressional recognition that the problem of air pollution is peculiarly a matter of state and local concern is manifest in this legislation. Such recognition is underlined in the Senate Committee Report:

> "'The committee recognizes that it is the primary responsibility of State and local governments to prevent air pollution. The bill does not propose any exercise of police power by the Federal Government and no provision in it invades the sovereignty of States, counties or cities.' S. Rep. No. 389, 84th Cong., 1st Sess. 3."

This compatible and supportive Federal Policy has been further supplemented by the Clean Air Act adopted December 17, 1963, (Public Law 88-206, 88th Cong., H. R. 6518) which contains, among other things, Section 2(b) reading:

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[20] This reference is to the act formerly known as the "Clean Air Act" adopted on July 14, 1955, and now known as "An act to provide for air pollution prevention and control activities of the Department of Health, Education and Welfare and for other purposes".

"The Secretary shall cooperate with and encourage cooperative activities by all Federal departments and agencies having functions relating to the prevention and control of air pollution, so as to assure the utilization in the Federal air pollution control program of all appropriate and available facilities and resources within the Federal Government".

More recently (in fact, last year) the Congress enacted the Air Quality Act of 1967 (Public Law 90-148, 81 Stat. 485) reiterating a national policy to encourage and not to displace action by local agencies to abate air pollution. (Section 108(b) and Sec. 109).

3. The Commission Arbitrarily Changed the Ground Rules which it had Previously Established as Justification for Its Delay In Processing the Gulf Pacific Application.

The processing of the Gulf Pacific application, filed February 12, 1963, was delayed and deferred by the Commission for the asserted reason that it desired to institute a comparative proceeding "to determine how the long-term needs for natural gas deliveries to Southern California may be met in the manner which is most desirable from the standpoint of the public interest" (*El Paso Natural Gas Company* Docket G-16235, 30 FPC 77, 92). After having instituted a proceeding on that basis, and for that asserted purpose, which resulted in delaying the commencement of the hearing on the Gulf Pacific application a full 16 months (in violation of both the Natural Gas Act and the Administrative Procedures Act), and then consuming another 25 months for hearing and briefing,[21] the Commis-

[21] The early procedural background helps to place in perspective the arbitrary actions of the Commission in this respect. Despite the mandatory language of both the Natural Gas Act ("shall set the matter for hearing," Sec. 7 (c), 15 U.S.C. 717f(c)), the Administrative Procedure Act ("shall proceed with reasonable dispatch to conclude any matter," Sec. 6(a), App. B, p. 11a) and the Commission's own Regulations (18 CFR 157.11), the setting for hearing was delayed deliberately to attempt to induce competitive applications (see App. C, pp. 15a-16a). The Commission was faced with its Regulation 157.11, providing that when an application is filed less

sion arbitrarily refused, in its Opinion and Order, to compare and analyze the alternative proposals before it on the comparative basis upon which the proceeding was ordered, thereby denying to Edison and the other proponents of the Gulf Pacific Project any true comparative hearing (c.f. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945)).

That off-the-record study, on which the Commission based its cost conclusions, was, aside from its other procedural and substantive defects, a one-year study purportedly covering the year 1970, but using 1968 levels of gas supply to the market, which it conceded to be grossly inadequate.[22] This was the basic economic "evidence" considered by the Commission (Op. 500, R. 68869, Jt. App., p. 787; Edison Petition to Commission for Rehearing, pp. 48-51, Exh. C to Petition for Review, pp. 51a, et seq.; Op.

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than fifteen days before the commencement of a hearing on a pending application and seeks authority to serve some or all of the markets sought in such pending application, or is otherwise competitive therewith, the new application shall not be set for hearing, in the absence of special findings (nowhere made in this case), until a final Commission decision on the pending application. The Commission lacked the power to compel competitive filings; it improvised the purported alternative of issuing invitations, and providing ample time for filing. The Commission ultimately went farther, and accepted the month late filing of what El Paso called an "amendment" to its application, but was in reality a totally new and different proposal offered as an alternative (R. 68827, Jt. App., p. 745; see protests of Gulf Pacific, R. 65663-675, Jt. App., pp. 583-95, Edison, R. 65681-2, Jt. App., pp. 596-7, Humble, R. 65708-713, Jt. App., pp. 600-5). Such action was clearly prejudicial to the Gulf Pacific proponents and was objected to by them. (See Motion for Order Giving Public Notice and Request for Early Hearing, filed June 7, 1963, R. 55204-210, Jt. App., pp. 468-74, Motion for Prompt Consolidated Hearing of CP63-204 and CP63-223, filed June 21, 1963, R. 55252-266, Jt. App., pp. 475-89, Motion to Expedite Procedure, filed August 2, 1963, R. 55349-361, Jt. App., pp. 490-502. See Appendix C for a more complete chronological statement of the proceedings). Time is of the essence to producers who can realize no revenues from substantial investments in gas properties until the gas begins to flow. As the Commission was well aware, delay alone can defeat a new pipeline project.

[22] Commission Brief to Court of Appeals for the Third Circuit, p. 25.

500A, R. 69323-4, Jt. App., pp. 1066-7) in a proceeding which it well in advance had "advertised" as one in which it would determine "how the long-term needs for natural gas deliveries to Southern California may be met in the manner which is most desirable from the standpoint of the public interest". (Emphasis added). (Re *El Paso Natural Gas Company*, FPC Docket No. G-16235, 30 FPC 77, 92).

The Commission's determination in its decision which followed (based upon its asserted "objective" review of the long term and upon its "knowledge" external to the record) that "flexibility", which avoids the making of commitments necessary to any long-term solution, was to be the governing criteria was tantamount to an arbitrary abandonment of any long-term solution, and constituted a reversal of the ground rules previously laid down by it as the reason for its extensively delaying the processing the Gulf Pacific application and for ordering a comparative hearing. Certainly, as a short-term solution, the Tailored Supply Program (TSP) sponsored by the gas companies and adopted by the Commission is not mutually exclusive with the long-term solution provided by the Gulf Pacific Project, and such comparison is thus not proper for a comparative hearing.[23] (C.f., *Ashbacker*, 326 U.S. 327, *supra.*) The Commission in its opinion and order doesn't even make a finding of mutual exclusivity. As pointed out in

[23] The inadequacies of the TSP to meet even the short-term gas supply needs of the area is well evidenced by the fact that already El Paso has filed a new application to increase its gas deliveries to southern California by some 154 million cubic feet per day commencing November 1, 1967, less than a year after the increased deliveries under the certificate granted in the Order accompanying Opinion No. 500 were to be effective. (FPC Docket CP67-217.) A similar application for an additional increment (110 million cubic feet per day) was subsequently filed with deliveries to commence November 1, 1968 by Transwestern. (FPC Docket CP68-181). Nor could the Commission itself be deemed unaware of the inadequacy of the TSP. Its own gas balance (R. 69338, Jt. App., p. 1081) "Without Gulf Pacific" reflects total market curtailments in 1970 of 203,156 Mcf, a shortage almost equal to the total TSP volumes.

the Dissent: "There is no finding that additional supplies beyond 1968 are not necessary. There is no finding that El Paso expanded is not required. Neither is there a finding on a comparative basis as to why Gulf Pacific must be denied." (R. 68904, Jt. App., p. 822). This arbitrary reversal, after the conclusion of the hearing, of the ground rules which were theretofore used by the Commission as a basis for delaying the prompt processing of the Gulf Pacific Project, constitutes a denial to Edison of a prompt and fair hearing as required by Section 6(a) of the Administrative Procedures Act[34] and of due process of law. (C.f., 18 C.F.R. § 157.11, App. B hereto, pp. 13a-14a).

4. The Commission Unlawfully Applied The Provisions Of The Natural Gas Act And In So Doing Exceeded Its Authority.

(a) The Commission Applied Improper Standards Of Public Convenience And Necessity.

While assuming that there would be adequate future supplies of gas available to serve the needs of the California market and that there would be no future problems with respect to gas acquisition and supply (R. 68841, Jt. App., p. 759), the Commission applied improper standards of public convenience and necessity[35] and in so doing exceeded its statutory authority by denying to the southern California public a higher level of gas service, which the record shows it wanted and was willing to pay for[36], simply

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[34] App. B. hereto, pp. 10a-11a.

[35] It did not question the fact that Gulf Pacific met the traditional requirements of public convenience and necessity (i.e., adequacy of supply and market, economic feasibility and ability to finance — see re *Kansas Pipeline and Gas Company*, et al., 2 FPC 29 (1939); re *Houston Texas Gas & Oil Corp.*, et al., 16 FPC 118, 122 (1956)).

[36] The willingness of the public in southern California to pay for measures designated to eliminate possible contributing sources of air pollution is reflected in the evidence. Industry in Los Angeles County has expended nearly $108 million for air pollution control equipment

because the Commission did not agree with the public's desires (or the reasons therefor) for increases in the level of gas service to the area. In so doing, the Commission made no finding and expressed no determination that the satisfaction of the public's insistent demands in this regard would deprive other areas of adequate gas service. The denial of the Gulf Pacific Project (which the record showed without dispute would provide for substantially less burning of fuel oil and a higher level of gas service in the area in accordance with the public's demands — Exs. 639-640, R. 35979-82, Jt.App., pp. 364-7; Proctor, R. 18156, 18163, Jt. App., pp. 131-2) for such a reason, involves a misinterpretation and an arbitrary, capricious and unlawful application of the statutory standard of public convenience and necessity. (Cf., re *Kansas Pipeline & Gas Co.*, 2 FPC 29, 56; *Union Pacific R. Co. v. Public Service Comm.*, 103 Utah 459, 135 P(2d) 915, 918.). It is no different in this respect than would be an administrative determination in Washington that the people of southern California who prefer to enjoy total electric living should be deprived of the opportunity to do so because of a determination that in some applications the burning of gas, coal, wood, or old rubber tires, would be cheaper or would assist the economics of the businesses of those engaged in such sales.

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which is largely non-productive, APCD has banned almost 2 million incinerators whose capital investment was estimated to be $40 million, and established in place of them an area-wide rubbish collection system that cost the taxpayers $30 million a year; the reason was to eliminate air contaminant emissions which were not large in terms of percentage of total tons of emission (e.g., R. 422-3, Jt. App., pp. 17-18; cf., Ex. 41, pp. 85-6, 88-97, 114-121, R. 29340-41, 29343-52, 29369-76, Jt. App., pp. 213-232). Furthermore, since 1956 Edison alone has expended more than $3,500,000 in research efforts to search out means of eliminating contaminants from the burning of fuel oil (e.g., Ex. 41, p. 89, R. 29344, Jt. App., p. 216). These expenditures are clearly reflective of both the seriousness of the problem and the earnestness with which those who are directly affected are searching out feasible solutions.

(b) The Commission Unlawfully Applied The Provisions Of The Natural Gas Act Relating To Direct Industrial Sales.

The Commission erroneously interpreted the exemption for direct sales to be limited to situations in which direct sales are "a useful adjunct to the normal operational pattern of interstate pipelines" (R. 68881, Jt.App., p. 799). This restrictive interpretation of Section 1(b) (see App. B, p. 5a) of the Natural Gas Act is nowhere to be found in the Act, is without authority in law, and is contrary to the intent of the law.

As stated in the dissenting opinion, "Such a decision flies in the face of the Congressional mandate exempting direct sales from Commission jurisdiction" (R. 68956, Jt.App., p. 874).[27] The effect of the Commission's attempt so to exceed its statutory authority by denying a certificate to Gulf Pacific is to deny to Edison the benefits of, and property rights in its contracts underlying the Gulf Pacific Project without due process of law.

In Opinion No. 500-A (R. 69324, Jt.App., p. 1067), the Commission purports to explain away its aforesaid statement from Opinion No. 500 regarding direct industrial sales as being directed at the nature of Gulf Pacific's proposed operation as an exclusively industrial pipeline,[28] and not at direct sales as such, but then goes on to refer to other cases where the Commission had certificated pipelines which do not make sales for resale[29] "where the particular

[27] Cf., *Federal Power Commission v. Transcontinental Pipeline Corp.*, 365 U.S. 1 (1961); Re *Natural Gas Pipeline Co. of America*, FPC Docket No. CP 62-243, et al., Opinion No. 474 issued September 9, 1965, 34 FPC 771.

[28] Furthermore, treatment of Gulf Pacific as exclusively industrial in its operations is in conflict with the Commission's sanction as recently as last year in other proceedings of commingling gas in the same pipeline without destroying the non-jurisdictional character of the direct sale (see *Florida Gas Transmission Corp.*, FPC Docket CP65-393, Op. No. 516 issued March 1, 1967).

[29] Citing cases referred to in footnote 1, p. 10 of Op. No. 500-A, R. 69324, Jt. App., p. 1067.

circumstances indicated that such operations would not adversely affect other gas customers in the area served."[20] The circumstance that the Commission may have properly applied the standard of the Natural Gas Act in other cases, of course, does not constitute an adequate answer to the charge that it improperly applied the law in this case nor does it justify the application in this case of an erroneous standard.

WHAT THE COMMISSION DID NOT DO

5. The Commission Failed, Or Refused, After Determining To Certificate The El Paso And Transwestern Proposals, To So Condition Such Certificates As to Protect The Constitutional Rights of Edison In Spite Of Timely Request By Edison For Such A Condition.

After making its determination that the substitution of gas for conventional fuel oil in electric generation would not significantly contribute to air pollution control (R. 68839, Jt. App., p. 757) the Commission concluded that economics should be the controlling consideration (R. 68865, Jt. App., p. 783), but thereafter arbitrarily refused to condition its certificate, in an appropriate way, which would permit the electric utilities to operate in the most economical manner from their standpoint. It thereby unlawfully discriminated against Edison and its electric customers and effected a denial of due process of law. This result necessarily follows because the effect of the local air pollution legislation is to require the electric utilities to burn all the gas that is made available to them by the Pacific Lighting gas distributors even when there is available for use in electric generation lower cost conventional fuel oil. It was unquestioned in this record that the optimum level of service of the so-called Tailored Supply Program (TSP), adopted by the Commission, was

[20] As found by the Examiner (R. 66629-31, Jt. App., pp. 674-6) the record showed that operations of the Gulf Pacific Project would not adversely affect other gas customers in the area served.

designed by Pacific Lighting to effect the most economical level of service from the standpoint of the gas companies (R. 68847-8, Jt. App., pp. 765-6). It was also established and unchallenged in the record that such level of service imposes added cost burdens upon the electric utilities (cf., R. 69322, Jt. App., p. 1065) and is not the most economical level from their standpoint (c.f., Dissent to Op. 500, R. 68942-3, Jt. App., pp. 860-1).

It is respectfully submitted that, under such conditions and so long as economics are deemed to be the controlling criteria, the only way in which the interests of Edison and its customers can be afforded due process, in such a case, is for the Commission's order to contain a condition which would provide that such gas could not be made available by the gas companies to the electric utilities for electric generation when there were cheaper alternatives available to the electric utilities. Under such circumstances, the inclusion of such a condition is necessary to provide equal protection and due process, and cannot be discretionary with the Commission.

WHAT THE COURT OF APPEALS DID

At the outset, in view of the Court of Appeals having taken occasion in its opinion to make reference to the circumstances that Humble Oil & Refining Company and other producers have terminated their gas supply contracts and that Gulf Pacific Pipeline Company has now been dissolved, we feel constrained to point out to this Court the fact that it was previously determined by the Court of Appeals, following motions to dismiss and full argument thereon, that such circumstances do not render the case moot (Order of Court of Appeals dated Sept. 29, 1967 on Intervenors' Motion to Dismiss) and that it did not in its decision overrule its determination in this respect, as indeed it could not have properly done.[21] We have in-

[21] Reference is also made to Edison's Answers to Motions to Dismiss in record certified to this Court.

cluded in Appendix E, a brief summary of the sound bases for such determination under the principles established by *City of Pittsburgh vs. FPC*, 237 F(2d) 741 (1956), *Scenic Hudson Preservation Conf. v. FPC*, 354 F(2d) 608 (1965), cert. den., 384 US 941, and *Montana-Dakota Utilities v. FPC*, 169 F(2d) 392, 399 (1948) and an example of the appropriate relief which could now be granted to petitioner and which is sought by it.

The Court of Appeals Erred in Concluding that the Commission's Orders Were Rationally Based, Supported by the Record and Reached by Procedures Required by Law.

After reciting that the critical questions, in its view, were whether the Commission's order "was rationally based, supported by the record, and reached by procedures required by law", the Court of Appeals really did no more than announce its conclusion that on reviewing the record, "the questions compel answers in the affirmative" and did not provide any meaningful disclosure of what in the record or otherwise it felt compelled it to reach such conclusion. (Court of Appeals Opinion, filed December 21, 1967 in No. 16434, App. A hereto, pp. 2a-3a.)

According to the Court of Appeals' own recital of its criteria for review, it is clear that all three conditions had to be met in order to justify the Court of Appeals' affirmance of the Commission's decision. Its failure to disclose in any meaningful way the basis of its conclusion leaves everyone in the dark as to just how the Court of Appeals reached such conclusion. However, it is clear that it did err in its conclusion that the conditions were met.

1. The Court Of Appeals' Conclusion That The Commission's Order Was Rationally Based Contained an Inherent Ambiguity And Was Erroneous Upon All Alternative Interpretations.

In support of its action, the Court of Appeals stated: "Once the existence of a rational basis for the Commis-

sion's action is ascertained the reviewing power is estopped from further consideration of the Commission's action." (our emphasis). In doing so, the Court of Appeals created an inherent ambiguity which it declined to clarify when called to its attention by Edison's Petition for Rehearing. This Court's attention is respectfully directed to the fact that such statement of the Court of Appeals is subject to two very different interpretations, namely: (1) that the Court of Appeals concluded that the same basis which the Commission used was rational, or (2) that the Court of Appeals concluded that a basis different from that used by the Commission could rationally support the result. The refusal of the Court of Appeals to clarify this inherent ambiguity demonstrates that it assumed that it could properly affirm the Commission on either basis. In this, the Court of Appeals was demonstrably in error:

(a) If the Court of Appeals affirmed the Commission on some basis different from that relied upon by the Commission, which the Court of Appeals viewed as rational, it has clearly and erroneously exceeded its appellate jurisdiction. Such ruling would be in direct conflict with the decisions of this Court (*Sunray Mid-Continent Oil Co. v. FPC*, 353 U.S., 944 (1957); *S.E.C. vs. Chenery Corp.*, 318 U.S. 80 (1943); see also *FPC vs. Idaho Power Co.*, 344 U.S. 17 (1952)) and with decisions of other Courts of Appeal concerning the proper review of decisions of administrative agencies, (*Pan American Petroleum Corp. v. FPC*, 376 F(2d) 161, 174 (1967)). These cases hold that once it is determined by a reviewing court that the basis relied on by the regulatory agency is unlawful, its inquiry is properly at an end and that the reviewing court cannot properly sustain the action on some different basis. Neither of the cases cited by the Court of Appeals in its decision supports a contrary view.

(b) On the other hand, if the Court of Appeals affirmed on the same grounds relied upon by the Commission as sup-

port for its determinations, it is demonstrably in error, for the study (its outside-the-record gas balance study), which was the recognized foundation of the Commission's decision (Op. 500, R. 68869, 68880; Jt. App., pp. 787, 798; Edison Petition for Rehearing, Exh. C to Petition For Review, pp. 51a et seq.; Op. 500A, R. 69322-23, Jt. App., pp. 935-8, 1065-6), was not a study upon which the Commission's order could be rationally based:

(i) The Commission's decision was admittedly based upon its own comparative cost study which in turn, was admittedly based upon the Commission's "Gas Balance" (see references in preceding paragraph and Comm. Br. to CA for the 3rd Cir., p. 21), neither of which was ever presented in the record, and neither of which petitioner, despite its timely request, was ever given any opportunity to test by cross-examination or to rebut. Such outside-the-record "Gas Balance Study" of the Commission contained admitted error (Comm. Br. to the CA for the 3rd Cir., pp. 24-5), and concededly postulated gas supplies and storage operations which would force the Pacific Lighting system into the winter peak heating season with a zero gas storage balance "at a time of need" (Comm. Br. to the CA for the 3rd Cir., p. 25). No one claimed, and no one with any expertise could claim, that the Pacific Lighting system could be operated that way.

(ii) The Commission's response, while not denying that its "Gas Balance Study" reflected such zero balance, was that the problem could be resolved by simply buying more gas. However, the Commission had previously determined that the buying of more gas, i.e., a higher level of service, would produce higher costs (R. 68847-48, R. 68879, Jt.App., pp. 765-6, 797), and its comparative economic study did not reflect such higher costs admittedly necessary to provide adequate service and a fair comparison. The result is a purported testing of the economics of the situation ad-

mittedly without a consideration of all of the cost factors which would necessarily be involved. The conceded necessity of buying more gas would obviously require the construction of a completely new study and a completely new gas balance to meet at least the minimum market requirements in order to make any rational determination of the cost of gas at the load center and of the most economic supply combinations.

Before the Court of Appeals, the Commission, while conceding that the computations in its outside-the-record study were both extensive and complicated requiring the application of judgment evaluations (as distinguished from a mere arithmetic arrangement of basic figures), contended that, inasmuch as there were figures as to volumes and costs in the record which were utilized in the study, the study itself was a matter for the exercise of its expertise, relying again upon the *Market Street Railway* case (*supra*, pp. 16 et seq.). If the Court of Appeals decided to sanction the use of such outside-the-record study on such basis, it was clearly in error for there was absolutely no support in the record for the method of operation assumed by the Commission in its study; no opportunity was given to the petitioner to test or contest such assumed method of operation and the Commission conceded in its argument before the Court of Appeals (Com. Br. to the C. A. for the Third Circuit, page 21) that the system could not be so operated without purchasing more gas than was reflected in its study. The costs of such required additional gas were also not reflected in the study (see pp. 19-20, *supra*).

The Court of Appeals obviously could not properly conclude that the orders of the Commission were rationally based upon the same basis as that used by the Commission when such basis was predicated upon a study that was inadequate, incomplete and erroneous.

2. The Court's Conclusion That The Commission's Action Was Supported By The Record And Reached By Procedures Required By Law Is In Error And Sanctions Such A Departure From The Accepted And Usual Course Of Administrative Procedure As To Call For The Exercise Of This Court's Power Of Supervision.

As we have heretofore demonstrated (*supra* pp. 12 et seq.), the decision of the Commission in this proceeding was made in reliance upon materials and studies that were outside of the record, on which its findings on comparative economics were based (R. 68869, 68880, Jt. App., pp. 787, 798) in violation of Sec. 19(b) of the Natural Gas Act (App. B, pp. 8a-9a) and with respect to which the petitioner was denied all opportunity for cross-examination and presentation of rebuttal evidence, despite its timely request that it be permitted so to test and contest the disputed adjudicative facts covered thereby which were at the very center of the controversy.

The Commission's reliance upon such off-the-record studies constituted a patent violation of the Commission's own Rules of Practice and Procedure (§ 1.26(d)), and the Administrative Procedures Act (Sec. 7(d)), both of which require that ". . . any party shall on timely request be afforded an opportunity to show the contrary" when the administrative agency relies on material not appearing in evidence in the record. (See App. B, pp. 12a 14a).

The actions of the Commission also violated the guidelines heretofore recognized in *Ohio Bell Tel. Co. vs. PUC*, 301 U.S. 292, 300 (1936), where this Court, in reversing a rate order because of the Commission's having gone outside of the record in fixing property values for rate-making purposes, stated: "This is not the fair hearing essential to due process. It is condemnation without trial."

If the Court of Appeals' decision constitutes an intended judicial approval of the procedures followed by

the Commission here, under the guise of administrative "discretion" referred to in the Court of Appeals' decision, and if such decision were allowed to stand, it could, we submit, lead to a breakdown of the integrity of administrative justice and procedural due process. We are confident that in the case at bar, as in the past, such denial of a fair hearing essential to due process is of concern to this Court and would not be sanctioned by it and that this Court will invoke its power of supervision. (*Ohio Bell Telephone Co. v. PUC*, 301 US 292, 300).

3. Failure Of Court Of Appeals To Resolve Ambiguity It Created Unlawfully Denied Edison Its Statutory Review.

Failure of the Court of Appeals to disclose the basis relied upon by that Court, particularly after specific request to do so by Edison in its petition to that Court for rehearing, denied to Edison any effective review of the Commission orders as required by Section 19(b) of the Natural Gas Act. Yet in the absence of supporting reasons by the Court, such affirmance of unlawful Commission action could be construed as a precedent supportive of such unlawful action in future administrative proceedings.

When a party, such as Edison here, has a statutory right to a review of administrative agency action, such review should, in fairness, comprise a consideration of and disposition of all the issues raised by the petitioning party and the articulation of the basis for such disposition. (C.f., *FTC v. Standard Oil Co.*, 355 US 396 (1958)). This the Court of Appeals has clearly failed to do and such failure is legal error, resulting in a denial to Edison of its statutory right of appropriate judicial review under Section 19(b) of the Natural Gas Act.

CONCLUSION

We respectfully submit that this case, involving, as it does, a flagrant abuse of the administrative process in dealing with continuing controversies concerning competition for the California gas market, conflicts between the policies of the FPC, and those of federal, state and local air pollution control authorities concerning the use of gas for air pollution control purposes, and the preservation of procedural due process where the vital interests of millions of people have been so cavalierly and unexplainably dealt with and in which the public interest and the integrity of the entire administrative process is so imperiled, merits review by this Court.

We therefore respectfully urge that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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